(1)

90-1917

FILED
JUN 10 1991
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1991

KIRK L. WHITCOMBE and SUSAN, WHITCOMBE

Petitioners,

v.

UNITED STATES DEPARTMENT OF TREASURY; INTERNAL REVENUE SERVICE; RICHARD BERGMANS, IRS Revenue Officer, COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KIRK & SUSAN WHITCOMBE, Pro Se
43909 S.E. Tanner Road, Lot 5
North Bend, WA. 98045
(206) 831-6756

QUESTIONS PRESENTED

1. Was Susan Whitcombe's appeal properly dismissed for her failure to sign Notice of Appeal with her husband?

2. Where Petitioners afforded their rights of judicial review as stated and guaranteed under Circuit Court Rule 34-4(c)?

3. Does the tax refund suit remedy under 26 U.S.C. * 7422 afford adequate due process?

4. Was Whitcombe's Suit barred by the Anti Injunction Act, 26 U.S.C. Sec. 7421?

5. Were the Respondents in the District Court action properly dismissed under the doctorines of Sovereign Immunity and Qualified Immunity afforded government officials?

LIST OF THE PARTIES

Petitioners Kirk Whitcombe and Susan Whitcombe, husband and wife. Respondents Seattle are United States Department of Treasury; Internal Revenue Service; Richard G. Bergmans, IRS Revenue Officer; Commissioner of Internal Revenue Service.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES, CONSTITUTIONAL PROVISIONS, AND COURT RULES ENVOLVED	4
STATEMENT OF THE CASE	8
ARGUMENT:	
1. THE APPEAL WAS NOT SUBJECT TO DISMISSAL FOR SUSAN WHITCOMBES' FAILURE TO SIGN "NOTICE OF APPEAL	17
2. WHERE PETITIONERS AFFORDED THEIR RIGHTS OF JUDICIAL REVIEW AS STATED AND GUARANTEED UNDER CIRCUIT CR 34-4(c)?	20
3. REFUND SUIT AS CONSTITUTING ADEQUATE REMEDY AT LAW UNDER DUE PROCESS	23
4. PETITIONERS ACTION WAS NOT BARRED BY THE ANTI-INJUNCTION ACT	36

ARGUMENT: (Continued)

5. PETITIONERS' CAUSE OF ACTION AGAINST R. BERGMANS IN HIS INDIVIDUAL CAPACITY, PROPERLY STATED A CLAIM UPON WHICH RELIEF COULD BE GRANTED AND SHOULD NOT HAVE BEEN DISMISSED .. 40

REASONS FOR GRANTING THE WRIT 44

CONCLUSION 45

APPENDIX:

MEMORANDUM DECISION OF THE UNITED STATED NINTH CIRCUIT APPELATE COURT.. 1a

UNITED STATES DISTRICT COURT ORDER TO DENY PETITIONERS MOTION FOR RECONSIDERATION 12a

PETITIONERS "MEMORANDUM IN OPPOSITION TO THE APPELATE COURTS ORDER TO DENY ORAL ARGUMENT" WITH JUDICIAL NOTICE OF EXHIBITS 14a

TABLE OF AUTHORITIES

Cases: Page

Armstrong v. Manzo, 380 U.S. 545 (1965) 30

Bivens v. Six Unknown Named agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) 40, 43

Commissioner v. Shrapiro, 424 U.S. 614 (1976) 32, 34, 38

Enoch, District Director of Internal Revenue v. Williams Packing and Navigation Co., 370 U.S. 1 ..... 35, 37

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 41

Jensen v. I.R.S., 835 F.2d 196 (9th Cir. 1987). 34, 36, 39

Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951) 30

Jones v. State of R.I., 724 F. Supp 25 (D.R.I. 1989) 43

Leslie D. Robertson, TC Memo 1973-205, PH Memo TC 42

Lewis v. Lenc--Smith Mfg. Co., 784 F.2d 829 (CA7, 1986) 18

Mathews v. Eldridge, 434 U.S. 319 (1976) 30, 31

McNeil v. Blackburn, 902 F.2d 830 (CA 5, 1986) 19

Robinson v. City of Chicago, 848 F.2d 959 (CA 7, 1989) 20

U.S. v. Sandoval Vargas, 854 F.2d 1132 (9th Cir. 1988) 34

Federal Civil Procedure Circuit CR 34-4(c) 21

Federal Civil Procedure CR 11 18

26 U.S.C. * 6502 43

26 U.S.C. * 7422 ..... 31, 41

26 U.S.C. * 7426 ..... 20, 40

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unpublished. The Memorandum decision of Jan. 10, 1991 is reprinted in the Appendix hereto, page 1a, infra.

The Order of the United States District Court, Western District of Washington, at Seattle, on Denying Plaintiff's Motion For Reconsideration entered Nov. 8, 1989, has not been reported. It is reprinted in the Appendix hereto, page 12a, infra.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. * 1331, 1340, 1346(a), (b), and (e), 1361, 26 U.S.C. * 7426, and 5 U.S.C. * 701, et. seq. Petitioners' brought this suit in the U.S. District Court for the Western District of Washington at Seattle on March 7, 1989. On March 29, 1989 Petitioners Motion for Temporary Restraining Order and Preliminary Injunction was dismissed. On Court Order June 27, 1989 Petitioners Motion for Reconsideration was denied. On Aug. 30, 1989 United States' Motion to Dismiss was granted, Judgement entered Aug. 31, 1989, and Final Minute Order entered November 8, 1989, denying Plaintiffs Reconsideration of said Order and Judgement of Dismissal. Petitioners filed notice of Appeal Dec. 8, 1989, as authorized under 28 U.S.C. Sec. 1292(a)(1), jurisdiction of the United

States Court of Appeals, also being upon 28 U.S.C. Sec. 1291. On Jan. 10, 1991, Memorandum decision was entered by the United States Court of Appeals for the Ninth Circuit affriming the decision of the District Court. Subsequently, on March 11, 1991, Order of the United States Court of Appeals for the Ninth Circuit was entered denying Petitioners Petition for Rehearing and rejecting Petitioner's suggestion for a rehearing en banc. This Appeal is docketed within 90 days from the denial of rehearing below.

The jurisdiction of this Court to review the Judgement of the Ninth Circuit Court of Appeals is invoked under 28 U.S.C. * 1254(1).

STATUTES, CONSTITUTIONAL PROVISIONS, AND COURT RULES INVOLVED

U.S. CONSTITUTIONAL 4TH AMENDMENT - "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONSTITUTIONAL 5TH AMENDMENT - Protection of Rights to Life, Liberty, and Property. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the malitia, when in actual service in time of war or

public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Federal Rules of Civil Procedure, RULE 11. Signing of Pleadings, Motions, and Other Papers; Sanctions. "If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant."

Federal Rules of Civil Procedure, CIRCUIT RULE 34-4(c). Litigants have 10 days to respond to 9th Circuit Appelate Courts Order

to Deny Oral Argument.

Federal Rules of Civil Procedure - Rules of Evidence, Rule 201 JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort of sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is

entitled upon timely request to an opertunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

26 U.S.C. 6502. COLLECTION AFTER ASSESSMENT.

26 U.S.C. 7421 PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION

26 U.S.C. 7422 CIVIL ACTIONS FOR REFUND

26 U.S.C. 7426 CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS

STATEMENT OF THE CASE

Petitioner's Kirk and Susan Whitcombe, filed a Complaint for Temprorary Restraining Order, Injunctive Relief, and Damages against the United States of America, Commissioner of Internal Revenue, R. Bergmans, I.R.S. Revenue Officer, and other Respondents for unlawful levy and seizure of personal property on March 9, 1989, alleging that such levy and collection activety was without a proper basis, was arbitrary and capricious, was accomplished in violation of Petitioner's due process rights under the Fifth Amendment of the United States Constitution, in violation of the applicable Statute of limitations, and in violation of the rights of the Petitioner Susan Whitcombe, as a third party. Petitioner's Motion for Temporary Restraining Order was denied by Order of the District Court based

upon decision reached March 27, 1989 but entered on March 29, 1989. Petitioner's subsequent Motion for Reconsideration and Relief from said Order was denied by Order entered June 27, 1989. Respondent, United States of America, moved for Order of Dismisal on May 9, 1989, for lack of personal and subject matter jurisdiction and failure to state a claim, which Motion was granted by Order entered on August 30, 1989. Petitioner's moved for Reconsideration of such Order on September 18, 1989, which Motion was denied by Minute Order entered November 8, 1989. In the 9th Circuit of Appeals Petitioners sought the reversal, filed their Notice of Appeal on December 8, 1989, Respondents filed their "Brief of Appellees" June 28, 1990, Petitioner's filed their "Appellants' Reply Brief, The Appelate Court's Memorandum Decision to deny oral argument was rendered December 27,

1990, Petitioners filed their "Memorandum in Opposition to the Courts Order to Deny Oral Argument" January 14, 1991. The Appelate Court filed its Memorandum January 10, 1991, before allowing ten days as allocated in CR 34-4(c) for Petitioners to file their "Memorandum in Oppostion to the Courts Order to Deny Oral Argument", Petitioners then filed their Petition for Rehearing. March 11, 1991 the Appelate Court issued its Order denying Petitioner's Petition for Rehearing.

The Internal Revenue Service has assessed Petitioner, Kirk Whitcombe, primarily for "trust fund" taxes, allegedly owing from 1981 and 1982. However, it is not the assessment of such taxes on which Petitioners' Complaint in the United States District Court for the Western District of Washington was based. The true basis of Petitioners Complaint was the aggressive and

precipitious manner in which the alleged tax balances were sought to be collected after years of inaction and silence from the I.R.S., culminating in the seizure of Petitioner's vehicles used in connection with their logging operations, on February 10, 1989.

The chain of events ultimetely giving rise to Petitioners' action started on or about January 10, 1988, when Petitioner Kirk Whitcombe, was contacted by Respondent R. Bergmans, Revenue Officer for the Internal Revenue Service, followed by a period of approximetely six years in which there had been no communication or contact. On such occasion, Mr. Bergmans informed Mr. Whitcombe of the substantial balance of taxes, interest, and penalties claimed, the major portion of which was for the tax quarter ending June 30, 1981. Because the

termination of the limitations period for collection of such taxes was rapidly approaching, Petitioners were requested to executed a form of waiver, extending the limitations period and fixing the balance of tax owing, although the form actually presented was in blank and did not state a specific amount.

On numerous occassions from said date until the final seizure of Petitioner's vehicles, Petitioner attempted to obtain from Mr. Bergmans a detailed statement and account with regard to the Petitioners tax account showing how the claimed balance had been computed, and how significant payments in previous years had been credited and accounted for, including a payment in the approximate amount of $29,000.00 having been made on April 21, 1981, A 1980 1040 that was never refunded, plus an IRS acknowledged

refund from a 1980 and 1981 amended 941 tax return. Although Mr. Bergmans promised to provide such computations and information on the condition that Mr. and Mrs. Whitcombe execute the requested Statute of Limitations Waiver, such promise had not been carried out at the time that Petitioner's vehicles were seized and placed for sale. The Respondents' unsubstantiated claim of taxes were vigorously disputed by Petitioner's whose records indicated that not only were the taxes for the periods in question fully paid, but that Petitioner's should have been entitled to a substantial refund as the IRS had acknowledged in 1982.

Mr. Bergmans continued in his insistance that Petitioners sign the I.R.S. Limitations Waivers under threat of immediate seizure of their assets in the event of their failure to do so. Under such duress, Petitioners

were ultimetely coerced into executing uncompleted waiver forms, one on January 20, 1988 and another on January 21, 1988, at their home in Carnation, Washington. Such waiver forms were presented without prior notice and with virtually no opertunity to review and consider the implications of such documents, especially in blank. Numerous and repeated insistence and attempts through phone calls meetings and letters to obtain appropiate explaination and documentation for the tax balances claimed in connection with Respondents' Notice of Levies thereafter went unheaded.

The seizures of Petitioner's vehicles used in connection with his logging operations rendered him unable to continue such operations and Petitioner's ultimetely filed a Petition under Chapter 13 of the United Stated Bankruptsy Code on March 9,

1989. Subsequently, the Petitioner's Chapter 13 case had to be dismissed because of Petitioner's inability to make Plan payments.

As of the date of the filling of Petitioners' Bankruptsy, their net assets consisted of a 1980 Cadilac diesel automobile having an approximate value of $2500.00, miscellaneaous clothing and personal possessions valued at $100.00, cash in the approximate amount of $200.00, and miscellaneaous tools and logging equipment having an approximate value of $3000.00. Scheduled liabilities included said inconsistant I.R.S. claims in excess of $12,000.00, personal property tax in the amount of $3,726.87, industrial insurance in the amount of $15,388.48, and State of Washington excise tax of $4,764.93. Of said claim of debt to the State of Washington

$13,000.00 was undisputed. Petitioner's only income consisted of unemployment compensation in the amount of $832.00 per month, obviously insufficient to pay their estimated living costs totaling in excess of $1500.00 per month. The cessation of Petitioner's logging corporation had the further effect of placing four other persons, former employees of the logging company, on the unemployment roles.

Petitioners, Kirk Whitcombe and Susan Whitcombe, were married on February 19, 1987. Of the two vehicles seized by the I.R.S. the 1980 Toyota pickup truck was purchased in March of 1988, after the date of marriage of the parties. Such vehicle was purchased from the earnings of Kirk Whitcombe from logging operations after such date. Although the 1973 Ford utility vehicle was owned by Kirk Whitcombe prior to

the date of marriage, $2,734.60 was paid from community funds for costs incident to the repair, upkeep, and improvement thereof. No claim has been made that any of the claimed taxes on which Respondents' I.R.S. seizures were premised constituted an obligation from Susan Whitcombe.

ARGUMENT

1. THE APPEAL WAS NOT SUBJECT TO DISMISSAL FOR SUSAN WHITCOMBES' FAILURE TO SIGN "NOTICE OF APPEAL"

The Appelate Court in the Ninth Circuit had no right to dismiss Petitioner Susan Whitcombe from Petitioners husband and wife claim for several reasons; In accordance to CR 11. "Signing of Peadings, Motions, and Other Papers; Sanctions" "If a pleading, motion, or other paper is not signed, it

shall be stricken unless it is signed promptly after the ommission is called to the attention of the pleader or movant." (Emphasis added) Federal Rules of Appelate Procedure, 1990 edition. page 44.

Petitioner Susan Whitcombe was not given the chance to promptly sign what she and her husband thought was marital community interest that could be signed by just one of them as in Washington State law.

Furthermore other circuit courts have seen fit to deal with the problem of the non-signture on a Notice of Appeal by the proper appellant in a manner which has served to correct the deficiency, but without so drastically prejudicing or penalizing the appellant.

In Lewis v. Lenc--Smith Mfg. Co., 784 F.2d 829 (CA7, 1986), where another party had purported to sign the notice of appeal

on behalf of the appellant, the Court, although finding that the appellant's signature was necessary, granted the offending party an additional 30 days from the date of such ruling to correct the error by placing her signature on the notice of appeal and further extended the date for the filling of appellat's brief rather than imposing the extreme sanction of dismissing appelant's Appeal altogether.

In the case of McNeil v. Blackburn, 902 F.2d 830 (CA 5, 1986), it was held that the failure of the Petitioner in a Habeas Corpus action to sign his notice of appeal did not deprive the Court of Appeals of jurisdiction, wherein it was observed that there was no express requirement of signature in F.R.A.P. 3, it further being deemed doubtful whether CR 11 applies to notice of appeal.

The same result was reached in the case of Robinson v. City of Chicago, 848 F.2d 959 (CA 7, 1989), it further being observed that the signature of an agent of the appellant on a notice of appeal was sufficient for the purpose of commencing the appeal.

Thus it would appear, as CR 11 provides, and the above cited case law follows, that Susan Whitcombe and the martial community comprised of Susan Whitcombe and Kirk Whitcombe should have been allowed to continue to be the proper parties to their appeal. The Respondents should not so easily be permitted to avoid the significant claims presented in connection with 26 U.S.C. * 7426.

2. WHERE PETITIONERS AFFORDED THEIR RIGHTS OF JUDICIAL REVIEW AS STATED AND GUARANTEED UNDER CR 34-4(c)?

The Appelate Court's Memorandum Decision was procedurally premature because the December 27, 1990 Order denying oral arguement was not recieved by Plaintiffs until after the maximum ten days, (recieved Jan. 8, 1991, postmarked Jan. 7, 1991) provided by Circuit Rule 34-4(c), in which a party is afforded the opportunity to file a Statement setting forth the reasons why, in the opinion of such party, oral arguement should be heard. The Courts Memorandum Decision was en route to Petitioners on the very same day, Jan. 14, 1991, Petitioners timely mailed their "Memorandum in Opposition to the Courts Order to Deny Oral Argument. Attached hereto, labled Exhibit A, is a copy of Memorandum prepared by Petitioners in opposition to the Court's Order denying oral arguement. In denying Petitioners opportunity for oral argument, as well as such rights as provided in

Circuit Court Rule 34-4, Petitioners have been denied the opportunity to present to the Appelate Court adjudicative facts concerning which the Court could have taken judicial notice pursuant to Rule 201, Federal Rules of Evidence For United States Courts and Magistrates. Evidence of such facts are as set forth in exhibits attached to said Exhibit A, Petitioners Memorandum in Opposition to the Court's Order to Deny Oral Argument, and consistant of clear documentary proof of the erroneous and wrongful nature of Defendants' tax levies and seizures, as corraborated in such documentation of refunds of tax paid and abatement of penalties. It is submitted, further, that such documentary evidence itself comprises material points of facts which were, of necessity, overlooked in the Decision dismissing Appellants' Appeal and affirming the Judgement of the District

Court. If such stated reasons for oral arguement and additional documentary evidence had been disclosed prior to the Courts' Memorandum Decision of January 10, 1991, a sound basis would have been established for the granting of oral arguement to give all parties an opportunity to address the new developements which serve to clarify and resolve the issue of whether or not Petitioners' case truly should have been prosecuted as a refund suit, as opposed to an action for damages and injunctive relief in District Court.

3. REFUND SUIT AS CONSTITUTING ADEQUATE REMEDY AT LAW UNDER DUE PROCESS

The Appelate Court in ruling that the taxpayers in this case were limited to the remedy of a tax refund suit, it appears that

the Court has not correctly charactorized the true essence of Petitioners suit. There is substantial difference between an argument over the amount owed and Petitioners' argument over the government's refusal to reveal and document the basis for its attempted collection action so a taxpayer can understand what they are paying for. As in Petitioners case at bar facts subsequent to the commencment of this action now historicaly provides that Petitioners were denied a chance to snow the IRS their mistakes, before Petitioners' assetts and livelihood were seized. The purposes behind the constituional doctrine of due process would be greatly served by a clear pronouncement on the part of the Court of a requirement of documentation before collection implementation.

The basis of Petitioner's Complaint

emphatically was not solely or even primarily for a refund of taxes or improperly assessed. The essence of Petitioner's Complaint was the action of the Internal Revenue Service and Officer Bergmans in taking extreme enforcement action against Petitioner's without affording them a transcript or other appropiate documentation as to the basis and method of calculation of the balance of Petitioner's tax account being collected so that Petitioner could show the IRS their mistakes and with this knowledge convince the IRS, without any despute, or claim in refund court, that they have no reason to levy and seize Petitioners assetts and livelyhood. It is of major significance that developments, having occurred since the filing of the last briefs in the above Appeal, as partially documented in the attached Exhibit, have virtually eliminated

any basis for a refund court action and in fact shows that Officer Bergmans had no authority to levy and seize Petitioner's assetts because Petitioner had little or no liabilities owing the IRS at the time of the levies and follow up seizures and probably had money owed him from the IRS at that time. Had Officer Bergmans been required to supply Petitioner's the requested transcript or other documentation of the balances sought to be collected, the Respondents would have been placed in a possition to immediately recognize their own errors and the obvious lack of any basis or justification for the implementation of coercive waivers, installment agreements, and seizures of assetts.

In addition to specific statutory violations comprising Petitioner's causes of action against United States and R.

Bergmans, Petitioners have asserted significant constitutional claims stemming from Respondents' seizure of Petitioners' personal property without due process of law under the Fifth Amendment of the United States Constitution. Such seizure took place in the face of a very emphatic challenge of the tax balances being claimed without any semblance of prior opportunity for a fair and partial hearing. Petitioners were afforded neither an administrative hearing or even a semblance of transcript, or itemized accounting or billing informing Petitioners as to the manner of calculation of the balance of a tax account alleged to have accumulated over a period of many years. Petitioners' action does not involve a challenge of the original assessment of tax, but rather a documented claim on Petitioners' part that they have been charged for a significant amount of taxes

they have already paid and unless the IRS shows what they did with Petitioners' tax account Petitioner will be unable to show them their errors. Petitioners, as citizens of the United States find themselves faced with the proposition that they must give up or submit to the seizure of thousands of dollars of assetts on a moment's notice without so much as even a reasonable detailed invoice of the charges imposed or statement as to the manner of crediting of significant past payments. Petitioners have come into court seeking vindication of their long-held belief that the Constitution on which this nation is founded was framed for the very purpose of protecting individuals from such abuse of basic rights.

Petitioners recognize and acknowledge the significant national interest and necessity in providing for a mechanism of efficient

and timely collection of tax revenue. However, the necessity of balancing the individual rights of citizens versus such significant national interest must not be forgotten in the process. Petitioners respectfully submit, however, that the actions of the Respondents as upheld by the decision of the District Court and affirmed by the Appelate Court, if allowed to continue unchecked, would result in a state of serious imbalance on the side of arbitrary and unfair, if not tyannical government action at the expence of personel constitutional rights.

The concept of procedural due process, implemented as a fundamental constraint on governmental actions or decisions which deprive individuals of liberty or property interest, has taken a number of shapes and forms as applied to various rights and

interests and governmental activity · impacting the same. Nevertheless, as observed in Mathews v. Eldridge, 434 US 319 (1976), there are a number of overriding basic principles:

1. Some sort of hearing is required before an individual is to be finally deprived of a property interest.

2. The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' Joint Anti-Fascist Comm. v. McGrath, 341 US 123, 168 (1951) (Frankfurter, J. concurring)

3. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 US 545, 552 (1965)

In light of the foregoing, it is submitted that the answer to the question or issue as to whether 26 U.S.C. * 7422 affords Petitioners an adequate remedy at law will be found in resolving the question as to whether or not restricting Petitioners to such remedy in this context is consistant with due process. The question presented is the 7422 remedy alone meets the above due process criteria. Certainly, if such remedy does not comport with due process, it can hardly be charactorized as "adequate."

It is submitted that the * 7422 remedy or, more precisely, restricting Petitioners to such remedy alone, is not consistent with the tenants of basic due process as formulated in Mathews v. Eldridge, 434 US 319 (1976)

In applying the concepts of procedural due

process under the Fifth Amendment to the United States Constitution, in the context of tax assessments and levies and review thereof, the Supreme Court, in Commissioner v. Shapiro, 424 US 614 (1976) agreed that, unless the government has some obligation to disclose the factual basis for its assessments, either in response to discovery requests or on direct Order of the Court, the exception to the Anti-Injunction Act (available to a taxpayer when it can be shown that the government will certainly be unable to prevail) is meaningless. The taxpayer can never know, unless the government tells him, what the basis for the settlement is, and thus can never show that the government will certainly be unable to prevail. The Supreme Court held, in Shrapiro, that, even in the presence of the Anti-Injunction Statute, the Court has jurisdiction to inquire and develope a

record, including admission of evidence, on the question of whether the asserted tax deficiency was so arbitrary and exessive as to amount top an exaction in the guise of a tax. Unfortunately neither Mr. Bergmans nor the District Court recognized this case law so it wasn't until after Mr. Bergmans had levied and seized Petitioners equipment and even after Mr. Bergmans auctioned Petitioners trucks off while Petitioners case was in District Court that Petitioner was able to obtain the transcript of his account from Ogden Utah branch of the IRS where he was able to immediately find out multiple IRS errors clear back in 1979 and 1980 that caused Petitioners tax account to show a liability rather than a refund. As documented in Petitioners "Memorandum in Opposition to the Courts Order to Deny Oral Argument", the IRS Center in Ogden Utah upon seeing their mistakes in Petitioners account

have already started the abatement process with refunds. There never was a need for a refund court.

Many of the cases dealing with the question of determining the adequacy of a remedy at law and assessing the necessity of a pre-levy hearing center around the severity, harm, or damage being faced by the taxpayer. Although such showing has been very extreem in some of the relevent authorities, such as Shrapio supra., U.S. v. Sandoval Vargas, 854 F2.d 1132 (9th Cir. 1988), which envolved pending incarceration; it is submitted that the prospect of financial ruin, or loss of the ability to provide the necessities of life for taxpayers and their families, constitutes more than a sufficient showing of irreparable harm. Jensen v. I.R.S., 835 F.2d 196 (9th Cir. 1987).

The District Court, recognized Petitioners' satisfaction of the initial prong of the two-prong judicial exception to the Anti-Injunction Act (26 U.S.C. * 7421), as established in Enochs, District Director of Internal Revenue v. Williams Packing and Navigation Co., Inc., 370 U.S. 1, in that the government had not disclosed the information necessary to litigate the question of whether its assessment had a basis in fact. The Court, however, found a basis for dismissal of Petitioners' claims against the United States and Commissioner of Internal Revenue, however, in finding that Petitioners had failed to satisfy the second prong, namely qualification for equitable relief. Although conceding a strong showing of irreparable injury, including closure of Petitioners' business, it was concluded that such injury, even the ruination of taxpayer's enterprise, was not

sufficient to warrant equitable relief and the finding that Petitioners lacked an adequate remedy at law. It is submitted, however, that this finding is clearly contrary to the holding of Jensen v. I.R.S., cited above. The plight faced by taxpayers in that case was not significantly different than that to which Petitioners have been subjected as a result of the Respondents' unlawful seizure. Jensen faced the financial inability to support himself and his family. It is submitted that the Petitioners in this case have established a very similar magnitude of loss. The peril faced by Mr. and Mrs. Whitcombe was considerably greater than the loss of their vehicles and cost to retrieve them.

4. PETITIONERS ACTION WAS NOT BARRED BY THE ANTI-INJUNCTION ACT.

Petitioners take great exception the claim that they, as taxpayers, are continue to be limited to the "narrow judicial exception" to the Anti-Injunction Act as framed in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962), as stated at page 22 of Appellees' Brief. Petitioners would have been placed in a virtually impossible possition had such requirement been imposed, because the essential data necessary to evaluate the prospect of the government's prevailing was in the exclusive control of the Internal Revenue Service, and it, through officer Bergmans, was totally uncooperative in divulging a transcript containing such data, or in otherwise providing any information other than a constantly changing raw number stating Whitcombes' claimed ultimate tax liability. In view of today's computor technology and ease of assembly, processing, and

dissemination of information, the practice of levying and seizing of equipment essential to the taxpayers livelihood, without written accounting or other documentation of claimed balances in the process of collecting disputed and undocumented tax liabilities is unexcusable and should be deemed a due process violation itself.

This Honorable Court has recognized the prejudice to a taxpayer in Petitioners' position from the taxing authority's failure and refusal to provide sufficient data and calculations concerning the disputed tax liability to at least enable the taxpayer and, subsequently the Court, to evaluate the government's likelihood of prevailing. Commissioner v. Shapiro, 424 U.S. 614 (1976).

The District Court was correct in holding that the witholding of such information excused Whitcombes from having to prove that the government could not ultimately prevail under any circumstances. What the Appelants/Petitioners sought to challenge in their Appeal, was the Distict Court's assessment that Whitcombes have not sufficiently established irreparable harm. In considering this latter question, it is submitted that the case of Jensen v. I.R.S., 835 F.2d 196 (9th Cir. 1987) is indeed germane and the Whitcombes' reliance thereon has indeed not been misplaced, as suggested by Respondents. Although admittedly distinguishable on some points not pertinent here, the case clearly defines the nature and extent of irreparable harm requisit for injunctive relief, and, in light of such authority, it is submitted that Petitioners have met all the criteria.

In addition, the claims and grievances of Susan Whitombe and the marital community under 26 U.S.C. * 7426 constitute clear exceptions to the Anti-Injunction Act and sovereign immunity; and Petitioners remain entitled to injunctive relief.

5. PETITIONERS' CAUSE OF ACTION AGAINST R. BERGMANS IN HIS INDIVIDUAL CAPACITY, PROPERLY STATED A CLAIM UPON WHICH RELIEF COULD BE GRANTED AND SHOULD NOT HAVE BEEN DISMISSED.

The essence of Respondents' argument under Section B. 1 of Appellees' Brief is that 26 U.S.C. * 7422 afforded Petitioners an adequate remedy and that Petitioners were therefore not entitled to bring a Bivens cause of action against such Respondent.

The dismissal of Petitioners' claim

against officer Bergmans was further based upon qualified immunity, under the authorities cited, it appears that the outer boundaries of immunity, as far as government officials are concerned, extend to the maximum point at which the conduct thereof does not violate clearly established statutory, or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S.800 (1982). Based upon such criteria, Respondents argue that Petitioners have presented no facts indicating that officer Bergmans violated any of taxpayers' clearly established constitutional or statutory rights.

The extent to which Respondents sought to minimize and make light of Petitioners' grievances against officer Bergmans is disturbing. The essence of Petitioners' Complaint as to such Respondent was

infinitely more serious than that of an innocent or inadvertent over-collection of tax. Rather, Petitioners have complained of a course of conduct that can be charactorized as deceptive, arbitrary, coercive, and, indeed treacherous, especially in light of such Respondents' pressuring Petitioners to sign blank limitations waiver forms under the inducement of false promises of cooperation in providing detailed computations and explainations concerning Petitioners' claimed liabilities.

Such misconduct and the incomplete manner in which the waiver forms had been prepaired and presented rendered them invalid. Leslie D. Robertson, TC Memo 1973-205, Par. 73, 205 PH Memo TC. Hence the collection of such outlawed and stale taxes subsequent to the expiration of the original, unextended

limitations period was statutorily unlawful. 26 U.S.C. * 6502. The Respondent R. Bergmans, not some nameless official, was clearly identified as being at the heart and center of all such wrongfull actions. Such sufficient allegations of personal conduct sufficiently state a claim against the Respondent in his individual capacity. Jones v. State of R.I., 724 F.Supp 25 (D.R.I. 1989). That the actions of the Respondent, Bergmans, were under color of the law and his position as a Revenue Officer with the Internal Revenue Service sets forth the essence of a Bivens cause of action, Rather than a departure from the Bivens doctorine. Bivens v. Six Unknown Named agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 SCt 1999, 29 LE 2d 619 (1971).

In light of such unlawful seizure action,

not to mention the due process violations previously alluded to in heading I of Appelants' Opening Brief, pages 10 through 15, the Respondent R. Bergmans certainly was not protected by any qualified immunity and should not have been dismissed.

REASONS FOR GRANTING THE WRIT

It is important that these matters be reviewed by the U.S. Supreme Court because extremely significant and fundamental issues have been raised concerning basic due process rights in the context of IRS collection action. It is of fundamental importance that the basic right of access to documentation of the basis of tax collection be afforded citizens prior to the precipitous seizure of their property.

Furthermore, this case raises a significant issue concerning appropiate action in the event of the failure of a spouse to sign a Notice of Appeal involving the rights of both spouses and the marital community. Other circuits have responded to such deficiency in a manner which has proved to be much less prejudicial to the rights of the parties and in a manner quite inconsistent with the approach which has been taken by the Ninth Circuit. It is appropiate that such question be considered for the purpose of properly responding to such lack of uniformity amoung the circuits.

CONCLUSION

It is respecfully submitted that, for the reasons as enumerated above, this Petition should be granted.

BEST

DATED this 8th day of June, 1991

Respectfully submitted:

Kirk L. Whitcombe, Pro Se
43909 S.E. Tanner Road #5
North Bend, WA 98045
(206) 831-6756

Susan S. Whitcombe Prose
43909 S E Tanner Rd #5
North Bend, WA 98045
(206) 831-6756

VAILABLE COPY

No. 90-35039 Filed Jan 10, 1991

MEMORANDUM DECISION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, BEFORE CIRCUIT JUDGES WRIGHT, BRUNETTI, AND LEAVY:

An action for damages and injunctive relief was brought by these federal taxpayers for an allegedly wrongful assessment and collection of unpaid taxes. The district court dismissed the action for lack of subject matter jurisdiction. We affirm.

I

In 1982 and 1983, Kirk Whicombe was assessed for federal taxes owed for 1981 and 1982. He ran a small logging business that employed several people. He was married in

1987 to Susan Whitcombe, who is co-plaintiff in this suit.

On January 20, 1988, Internal Revenue Service official Richard G. Bergmans contacted Whitcombe about nonpayment of the owed taxes. Because the statute of limitations for collection of the taxes was running, the IRS asked the Whitcombes to sign a waiver form. They initially refused, asking for documentation about how the allegedly unpaid taxes were calculated in light of previous payments. They contend they had overpaid and were entitled to a refund. They signed two waivers on January 21.

Because the Whitcombes defaulted on their installment agreement with the IRS, the IRS served them with Notice of Intention to Levy and a Notice of Seizure on October

13, 1988. On February 10, 1989, two trucks were seized. They were registered in Kirk Whitcombe's name and used by his logging business. One of the vehicles was purchased after the Whitcombes were married. Susan Whitcombe claims it is community property.

Without trucks, Kirk Whitcombe was unable to continue his logging operation and in March 1989 the Whitcombes filed for bankruptsy under Chapter 13. The bankruptsy action was dismissed later because they failed to meet the payment plan.

On March 6, 1989, the Whitcombes recieved notice that the IRS was going to sell the trucks. They filed this suit on March 27, 1989, asking for injunctive relief, return of the trucks, judgment for overpaid taxes and damages. The district court dismissed the complaint for lack of subject matter

jurisdiction and denied their motion for reconsideration.

II

A timely notice of appeal is a jurisdictional prerequisite to appellate review. Fed. R. App. P. 4(a). The notice must be signed by the party or her attorney. McKinney v. De Bord, 507 F.2d 501, 503 (9th Cir. 1974). The appellants here are pro se and only Kirk Whitcombe signed the notice. Carter v. Comm'r, 784 F.2d 1006, 1008 (9th Cir. 1986). We dismiss Susan Whitcombe's appeal for lack of jurisdiction.

III

Without a specific statutory waiver of sovereign immunity, the United States and its agencies may not be sued eo nomine.

Blackmar v. Guerre, 342 U.S. 512, 515 (1952); Shelton v. United States Customs Serv., 565 F.2d 1140, 1141 (9th Cir. 1977). No broad waiver of sovereign immunity applies to the Treasury Department of IRS. See Liffiton v. Keuker, 850 F.2d 73, 77 (2d Cir. 1988); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985); Castleberry v. Alcohol, Tobacco & Firearms Div. of Treasury Dept., 530 F.2d 672, 673 n.3 (5th Cir. 1976). Sovereign immunity cannot be avoided by suing employees of officers of the agency in their official capacity. Gilbert, 756 F. 2d at 1458.

This is not a refund action under 26 U.S.C. * 7422, and Kirk Whitcombe presents no statutory evidence that sovereign immunity has been waived. 1/ Whitcombe's claims against the Treasury Department, the IRS and Bergmans, as as IRS official, must

be dismissed for lack of jurisdiction.

IV

Whitcombe contends his complaint, affidavits and memoranda clearly indicate that he intended to sue Bergmans in his individual capacity. Even if that were true, Bergmans is entitiled to qualified immunity. Government officials are immune from damage suits "insofar as their conduct does not violate clearly established statutory or constituional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Whitcombe does not allege that Bergmans violated IRS procedures. 2/ He argues that he was deprived of a pre-seizure hearing or explanation, but he does not deny that he recieved the Notice of Intention to Levy and

Notice of Seizure. He also had discussed his delinquent tax situation with Bergmans months earlier.

1. Relience on the Fifth Amendment, general jurisdictional statutes and provisions of the Administrative Procedures Act as authority for waiver of sovereign immunity is foreclosed by this court's decision in Gilbert, 756 F.2d at 1459; see Califano v. Sanders, 430 U.S. 99, 105 (1977). Susan Whitcombe's wrongfull levy action under 26 U.S.C. * 7426 is irrelevant here, because this court has no jurisdiction over it.

2. Whitcombe does not argue that premising the collection of taxes on the statute of limitations waiver was wrong because the waiver was invalid and improper as the amounts owed were not filed in on the forms. First,he cites no authority for the proposition that the forms were invaolid if the amounts owed were left blank. Second, the amounts owed were filled in on the copies of the waivers in the record. Bergmans' affidavit also says the forms were filled out completely before Whitcombe signed them.

A post-deprivation hearing in a tax collection matter is sufficient to meet minimum due process requirements. Commissioner v. Shapiro, 424 U.S. 614, 630 n. 12 (1976); Bob Jones Univ., 416 U.S. at

746-48. Thus Whitcombe has alleged no violation of his due process rights that was "sufficiently clear that a reasonable official would understand that what he [was] doing violat[ed] that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Because Bergmans is entitled to qualified immunity, Whitcombe failed to state a claim upon which relief may be granted.

V

The Anti-Injunction Act works as a general bar to suits to enjoin collection of taxes. 26 U.S.C. * 7421 (1988). Whitcombe alleges that he falls within the exception created by Enochs v. Williams Packing Co., 370 U.S. 1 (1962). Williams Packing requires that the plaintiff show that (1)

"under no circumstances" the government will ultimately prevail and (2) "equity jurisdiction" otherwise exists. Id. at 6-7. The second prong requires a demonstration of irreparable harm and the lack of an adequate remedy at law. Jensen v. I.R.S., 835 F.2d 196, 198 (9th Cir. 1987).

The district court held that the first prong of the Williams Packing test did not need to be addressed because the government did not disclose information as required by Commissioner v. Shapiro, 424 U.S. 614, 628 (1976). The court also concluded that Whitcombe failed to allege an irreparable injury and to show that the refund action was not an adequate remedy. In dissmissing the action, the court correctly noted that both prongs of Williams Packing must be met to render the Anti-Injunction Act inapplicable. See Alexander v. "Americans

United" Inc., 416 U.S. 752, 758 (1974).

This court has held that the refund action under * 7422 is an adequate remedy at law, which sufficiently protects due process rights. Cool Fuel, Inc. v. Connett,685 F.2d 309, 314 (9th Cir. 1982); Stonecipher v. Bray, 653 F.2d 398, 401 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982).

The seizure of the trucks certainly caused financial hardship. Unlike the taxpayer in Jensen, however, no levy was placed on Whitcombe's wages and the record indicates that he could have gotten the two vehicles back by paying the minimum bid of $1200 plus other expences. Whitcombe does not allege that he could not pay the $1200. More significantly, Whitcombe does not allege that he was unable to pay the minimum amounts required to bring an action under *

7422. 3/ In contrast, Jensen was unable to pay the deficiency and the IRS action had prevented him from pursuing any administrative remedy. 835 F.2d at 198.

Because * 7422 was an available remedy to contest the assessment and collection of taxes, Whitcombe fails to meet the Williams Packing test. His claims for injunctive relief are dismissed.

3. Before initiating a refund suit under * 7422, the taxpayer must pay the assessed taxes. When the taxes are "divisible," as they are here, the full-payment rule is fulfilled if the taxpayer pays what is owed for one taxable event. Flora v. United States, 362 U.S. 145, 171 n.37 (1960). Whitcombe would have to pay only the taxes due for one quarter for one employee.

We dismiss the appeal as to Susan Whitcombe and affirm the judgement as to appellant Kirk L. Whitcombe.

MINUTE ORDER OF THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE IN CAUSE NO. C89-334Z ON PLAINTIFF'S MOTION FOR RECONSIDERATION, ENTERED NOV. 8, 1989 PER JUDGE THOMAS ZILLY, UNITED STATES DISTRICT JUDGE:

The court DENIES reconsideration of the dismissal of the Bivens action against Internal Revenue Officer Bergmans. The alleged involvement of Bergmans was not in an individual context, but in an official capacity as a "instrument" of the government officials and agencies. All specific allegations against Bergmans are prefaced by the statment that:

> Defendant, R. Bergmans, is and at all material times hereto was an Internal Revenue Service Officer and all acts hereafter alleged as having been performed by said Defendant were performed for and on behalf of the United States Department of Treasury, and Internal Revenue Service, Commissioner of Internal Revenue, and the District Director at Seattle....(Emphasis added).

Additionaly, in requesting damages, the plaintiffs ask for the "entry of Judgement against the United States Department of the Treasury" and "for damages.....for Defendants' wrongful seizures and levies ....." (emphasis added). Complaint, p. 11. Both allegations and requests for damages against Bergmans are made in his official capacity, not his individual capacity.

The Court also DENIES reconsideration

of the dismissal of Mrs. Whitcombe's claim. 26 U.S.C. * 7426, a statutory exception to the Anti-Injunction Act, 26 U.S.C. * 7421, under which Mrs. Whitcombe attempts to fit, protects third party property in which the levied party has no interest. Rosenblum v. United States, 549 F.2d 1140 (8th Cir.), cert. denied, 434 U.S. 818, 54 L.Ed.2d 74 (1977). This section does not allow for challenges to the validity of assessments. Shannon v. United States, 521 F.2d 56 (9th Cir.), cert. denied, 424 U.S. 965, 47 L.Ed.2d 731 (1975).

Filed and entered this 8th day of November, 1989.

BRUCE RIFKIN, Clerk

By _____
Case Condon
Deputy Clerk

EXHIBIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM IN OPPOSITION TO THE COURTS ORDER TO DENY ORAL ARGUMENT

Plaintiffs, KIRK L. WHITCOMBE and SUSAN WHITCOMBE, submit this memorandum requesting oral argument.

Pursuant to Circuit Rule 34-4(c) of this court Petitioner requests that Oral arguement be heard. Further developements have occured since the filing of last briefs resulting in IRS refunds and credits which cause originated back in 1979 and 1980. Please note Exhibit "A" and "B". Plaintiff hereby requests that this court take judicial Notice as provided under Rule 201.

Therefore oral arguement would give parties opportunity to address the additional above said developements before the court. There is abundant record showing the failing to understand the basis of Petitioners appeal. Thank You.

By:_____

_____

KIRK L.& SUSAN L. WHITCOMBE

PRO-SE

43909 S.E. Tanner Road # 5
North Bend, Wash, 98045
206 831-6756 206 831 6066

(Mailed with an affidavit of mailing January 14, 1991.)

INTERNAL REVENUE SERVICE

Department of the Treasury

Appeals Office
Room 4311, Federal Building
125 South State Street
Salt Lake City, Utah 84138

Amount of Assessed Penalty(s)
$2,049.29

I.R.C. Section(s)
6651(a)(1), 6654(a), 6651(a)(2)

Tax Return or Document Form No:
941

Tax Period(s) Ended:
Dec. 31, 1979, Mar.31, 1980,
June 30, 1980

Date OCT.23 1990

Dear Taxpayer:

I have completed my review of your request to adjust the penalty(s) assessed against you. Based on the information submitted either in writing or by telephone, the proposal to settle the penalty(s) for $962.78 has been accepted. The balance of the penalty(s), if any, will be abated. The amount that has not been abated plus statutory interest should now be paid, if you have not already done so.

If you have any further questions on this matter, please call me at the telephone number shown below.

Sincerely,

Leslie Hackmeister
Appeals Officer
(801) 524-4304

SLC-AP-9

BEST AVAILAB

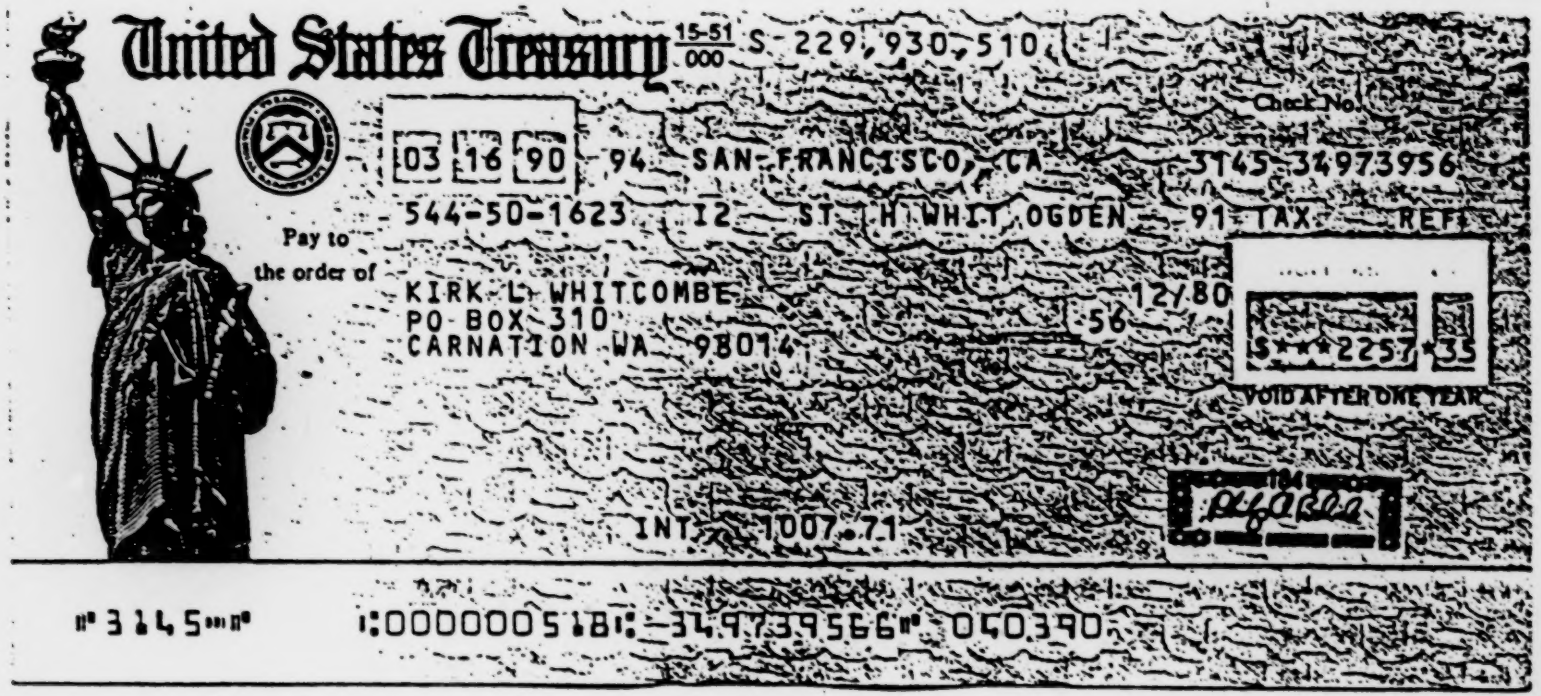

Exhibit B

17a

FILE COPY